



DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS  
DoITT

NYC Technology Center  
11 MetroTech Center  
Brooklyn, NY 11201  
(718) 403-8000

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RALPH A. BALZANO  
Commissioner  
NYC Chief Information Officer

BENJAMIN LIPSCHITZ  
Telecommunications Counsel  
Direct Dial: 718-403-8503  
Fax: 718-403-8504

October 8, 1997

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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OCT - 9 1997

FCC MAIL ROOM

Re: In the Matter of Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934;  
WT Docket No. 97-192 and FCC 97-303

Dear Mr. Secretary:

Enclosed please find an original plus ten copies of the comments of the City of New York Department of Information Technology and Telecommunications and the City of New York Department of Health, on behalf of the City of New York, in the above matter. Please distribute one copy to each Commissioner. Also, please stamp received one copy and return to my attention in the enclosed postage-paid envelope. Thank you.

Sincerely,

Benjamin Lipschitz



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RALPH A. BALZANO  
Commissioner  
NYC Chief Information Officer

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
)  
)

Procedures for Reviewing Requests for )  
Relief From State and Local Regulations )  
Pursuant to Section 332(c)(7)(B)(v) of the )  
Communications Act of 1934 )  
)

WT Docket No. 97-192

FCC 97-303

To: The Commission

COMMENTS OF THE CITY OF NEW YORK  
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS  
AND THE CITY OF NEW YORK DEPARTMENT OF HEALTH

Elaine Reiss  
General Counsel  
DoITT

11 MetroTech Center, 3rd Floor  
Brooklyn, NY 11201  
718-403-8500

Benjamin Lipschitz  
Telecommunications Counsel  
DoITT

Wilfredo Lopez  
General Counsel  
City of New York Department of Health  
125 Worth Street, Room 607  
New York, NY 10013  
212-788-5025

October 8, 1997



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To: The Commission

COMMENTS OF THE CITY OF NEW YORK  
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS  
AND THE CITY OF NEW YORK DEPARTMENT OF HEALTH

The City of New York Department of Information, Technology and Telecommunications ("DoITT") and the City of New York Department of Health ("DOH"), on behalf of the City of New York (the "City"), respectfully files these comments in response to the Federal Communications Commission's (the "Commission" or "FCC") request for comments on proposed procedures for filing and reviewing requests filed pursuant to § 332(c)(7)(B)(iv)-(v)<sup>1</sup> of the

<sup>1</sup> Section 704(a) of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7).

Communications Act for relief from state or local regulations on the placement, construction or modification of personal wireless service facilities (the "Facilities") based either directly or indirectly on the environmental effects of RF emissions.<sup>2</sup> DOH is the City agency charged with addressing health-related issues that arise in the City. DoITT is the City agency that is charged with, among other things, planning, formulating, coordinating and advancing telecommunications policies for the City of New York.

## I. INTRODUCTION AND SUMMARY

The Commission has the burden and authority, pursuant to § 332(c)(7)(B)(iv), to regulate RF emissions, and consequently, the City requests that the Commission actively monitor and enforce such RF regulations to fully protect the citizens of New York City. The City, however, is interested in retaining its power to protect the health, safety and welfare of its citizens. Though Congress prohibited direct and indirect municipal regulation based on RF emissions, the City reserves the right to protect the health, safety and welfare of its citizens under § 332(c)(7) and pursuant to the City's police and nuisance powers that are not preempted by the Telecommunications Act of 1996 (the "Act"). The City is also in accord with the arguments raised by the FCC Local and State Government Advisory Committee, and tentatively agreed with by the Commission, to the extent that § 332(c)(7) preserves the authority of local governments to verify on a case-by-case basis that the Facilities comply with the Commission's radio frequency ("RF") emission regulations.<sup>3 4</sup>

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<sup>2</sup> Public Notice, 62 Fed. Reg. 48,034 (1997) ("Public Notice").

<sup>3</sup> Advisory Recommendation Number 5, dated 8/27/97, at <http://www.fcc.gov/state&local/recommendation5.html> (the "Recommendation").

Participation by the public in RF proceedings under § 332(c)(7)(v), moreover, should be broadly construed because of the national relevance of RF issues, and the importance of RF issues to all citizens. And there should not be a rebuttable presumption that the Facilities comply with the Commission's RF emissions guidelines because it is more difficult for municipalities to show non-compliance than for Facilities providers to show compliance. Such a proof burden on municipalities would inappropriately impede municipalities ability to protect its citizens.

Accordingly, the Commission should narrowly construe its preemption power concerning RF issues and allow municipalities to retain the power to protect the health, safety and welfare of its citizens.

**II. ANY ALLEGED BASIS IN MUNICIPAL REGULATION OF RF CONCERNS DOES NOT JUSTIFY AUTOMATIC COMMISSION PREEMPTION OF SUCH REGULATION BECAUSE THE CITY RESERVES THE RIGHT TO VERIFY THAT THE FACILITIES DO NOT ENDANGER THE HEALTH, SAFETY AND WELFARE OF ITS CITIZENS.**

Where a regulation is allegedly based on RF emissions, but no justification for such regulation is given, the Commission should not automatically preempt such regulation. If no justification for a local regulation is given, the statutory requirement that siting decisions must be in writing and supported by evidence may be dealt with by the courts, as provided for under § 332(c)(7)(v). Commission review is the narrow exception under § 332(c)(7)(v), reserved solely for reviewing siting decisions based on Commission-complying RF emissions.

Importantly, there is no rebuttable presumption that local regulations of siting facilities are based on RF emissions concerns. And while a regulation may appear to be based on RF emissions, it may also likely be based on a number of other legitimate local health, safety and

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<sup>4</sup> Public Notice at 48,036, ¶ 9.

welfare concerns. Section 332(c)(7) explicitly reserves to municipalities the power to address its health, safety and welfare concerns. Accordingly, the mere alleged taint of RF concerns as the basis for municipal regulation should not automatically trigger Commission preemption because the City reserves the right to verify that the Facilities do not endanger the health, safety and welfare of its citizens.

**III. PERSONAL WIRELESS SERVICE PROVIDERS MUST PROVIDE COMPLIANCE INFORMATION TO AFFECTED LOCAL AUTHORITIES AND SUCH COMPLIANCE INFORMATION AND THE COMMISSION'S COMPLIANCE MECHANISM AND PROCEDURE SHOULD BE POSTED ON THE INTERNET.**

The City agrees with the Commission's proposed tentative conclusion that Facilities providers make a detailed showing, based on the Commission's three environmental classifications, that demonstrate compliance with the Commission's RF standards. The City also agrees with the proposed information requirements proposed by the Commission for a uniform demonstration standard for environmental actions that are categorically excluded from routine RF evaluation, as set forth in the Public Notice.<sup>5</sup> These information requirements, however, should represent a minimum and be modified as noted below.

Regarding environmental actions that require an Environmental Assessment ("EA") or environmental actions that do not require an EA but require routine evaluation, the City also proposes a modification of the Commission's proposed information requirements that Facilities providers be limited to only providing copies of any and all documents related to RF emissions to the FCC as part of the licensing process.

The City proposes a modification of these information requirements to require that copies

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<sup>5</sup> Public Notice at 48,037, ¶ 13.

of the documents provided to the Commission, or under the uniform demonstration standard, as applicable, also be provided to local authorities affected by the Facilities, upon request of such municipalities. Copies of such material should also be made available to all potentially interested parties by posting such material to a dedicated Commission Internet site. Similarly, copies of a written Commission compliance enforcement mechanism and a written Commission procedure to verify compliance should be provided, upon request, to local authorities potentially affected by the Facilities and should be posted on a Commission Internet site.

The Commission should also require Facilities providers to refile with municipalities, upon their request, and have reposted, the above information, at any time Facilities or Facilities providers are recertified or at any time there are physical changes in a facility that would affect RF emissions. Moreover, Facilities providers should be required to pay for the cost of any demonstration of compliance or updated demonstration of compliance for RF emissions, as required by the Commission.

**IV. PARTICIPATION IN COMMISSION RF PROCEEDINGS SHOULD BE BROADLY PERMITTED BECAUSE OF THE RELEVANCE OF THE RF ISSUES TO ALL CITIZENS.**

- Participation in Commission proceedings that request review under § 332(c)(7)(v) should be broadly construed to include any interested party, notwithstanding the traditional Commission requirements of standing in a proceeding. The issue of RF emissions is nationally relevant to all citizens, who should be permitted to participate in such RF proceedings, either on an association basis or on an individual basis. In addition, the statutory language of § 332(c)(7)(v) does not limit participation in these proceedings to only those "adversely affected" parties; the language "adversely affected" in § 332(c)(7)(v) refers to only the claimant or petitioner. All citizens are

potentially affected, at least in some degree, by the ability of a local government to govern the health, safety and welfare effects under its jurisdiction.

Allowing interested parties that are not immediately affected in one proceeding may also expedite the resolution of similar potential problems in other jurisdictions. Accordingly, given the national significance of the RF emissions issue and the consequent potential precedential relevance of a local decision, participation in an RF proceeding under § 332(c)(7)(v) should be broadly permitted.

## V. CONCLUSION

The Commission has the burden and authority, pursuant to § 332(c)(7)(B)(iv), to regulate RF emissions, and consequently, the City requests that the Commission actively monitor and enforce such RF regulations to fully protect the citizens of New York City. The Commission, however, should narrowly construe its preemption power concerning RF issues and allow municipalities to retain the power to protect the health, safety and welfare of its citizens. There should be no presumption that a municipal regulation is a regulation of RF emissions and there should be no automatic commission preemption of such regulation. Because § 332(c)(7)(B)(iv) preserves the authority of local governments to verify that the Facilities do not endanger the life or health of its citizens and that such Facilities comply with the Commission's RF regulations, Facilities providers must provide compliance information to affected local authorities, upon request. Moreover, because of the relevance of RF issues to all citizens, such compliance information and the commission's compliance mechanism and procedure should be posted on the Internet. Similarly, participation in Commission RF proceedings should be broadly permitted. In this manner, the Commission will balance the national interests in widespread wireless



communications, yet allow municipalities to continue to protect its citizens.

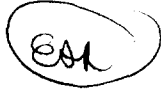
Respectfully submitted,

City of New York  
Department of Information Technology  
and Telecommunications (DoITT)

by Elaine Reiss

Elaine Reiss  
General Counsel  
DoITT  
11 MetroTech Center, 3rd Floor  
Brooklyn, NY 11201  
718-403-8500

Benjamin Lipschitz  
Telecommunications Counsel  
DoITT

by Wilfredo Lopez 

Wilfredo Lopez  
General Counsel  
City of New York Department of Health  
125 Worth Street, Room 607  
New York, NY 10013  
212-788-5025

October 8, 1997

## CERTIFICATE OF SERVICE

I, Benjamin Lipschitz, certify that a copy of the attached comments of the City of New York Department of Information Technology and Telecommunications and the City of New York Department of Health, on behalf of the City of New York, dated October 8, 1997, was served on this 8th day of October, 1997, by Federal Express next-day delivery to each of the following persons:

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

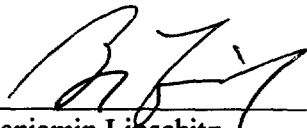
Hon. Reed E. Hundt<sup>1</sup>  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554

Hon. Susan Ness<sup>1</sup>  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Hon. Rachelle B. Chong<sup>1</sup>  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

Hon. James H. Quello<sup>1</sup>  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

Dated at Brooklyn, New York, this 8th day of October, 1997.

  
Benjamin Lipschitz

1. A copy was mailed by federal express delivery to the Office of the Secretary, requesting redelivery of one copy to each of the Commissioners.

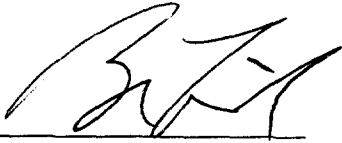
## CERTIFICATE OF SERVICE

I, Benjamin Lipschitz, certify that a copy of the attached comments of the City of New York Department of Information Technology and Telecommunications and the City of New York Department of Health, on behalf of the City of New York, dated October 8, 1997, was served on this 8th day of October, 1997, by first-class mail to each of the following persons:

Shaun A. Maher, Esq.<sup>2</sup>  
Federal Communications Commission  
Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
2100 M Street, N.W., Seventh Floor-Rm 93  
Washington, D.C. 20054

International Transcription Service, Inc. (ITS)  
2100 M Street, N.W., Suite 140  
Washington, D.C. 20037

Dated at Brooklyn, New York, this 8th day of October, 1997.



Benjamin Lipschitz

2. Mr. Maher received both a hard-copy version of the comments and a diskette-copy version.